Supreme Court, U.S.
FILED
APR 9 1997
OFFICE OF THE CLERK

(2)

NO. 96-1245

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

WILLIAM A. BRANDT, JR., AS TRUSTEE OF THE CHAPTER 7 ESTATE OF SOUTHEAST BANKING CORPORATION,
Petitioner,

v.

FIRST UNION CORPORATION, A NORTH CAROLINA CORPORATION AND FIRST UNION NATIONAL BANK OF FLORIDA, A NATIONAL BANKING ASSOCIATION, AND FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENTS FIRST UNION CORPORATION AND FIRST UNION NATIONAL BANK OF FLORIDA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Eugene E. Stearns
Mark P. Dikeman
Stearns Weaver Miller
Weissler Alhadeff &
Sitterson
Suite 2300 Museum Tower
150 West Flagler Street
Miami, Florida 33130
Telephone: (305) 789-3200

Ben F. Johnson, III
Counsel of Record
Dennis J. Connolly
Alston & Bird
1201 West Peachtree
Street, N.E.
Atlanta, Georgia 30309-3424
Telephone: (404) 881-7000

Counsel for Respondents
FIRST UNION CORPORATION
and FIRST UNION
NATIONAL BANK OF FLORIDA

35 pp

QUESTION PRESENTED

Following the closure of two insolvent Florida banks by federal and state regulators, First Union purchased the assets of the banks from the FDIC, as receiver for the failed financial institutions. The trustee in bankruptcy for the parent company of the banks sued First Union in tort and contract allegedly based upon First Union's pre-seizure conduct in sharing information regarding the banks with federal banking regulators. The District Court dismissed the action, finding that the trustee had no standing and that the conduct of First Union was authorized by a written agreement between First Union and the parent company. The Eleventh Circuit Court of Appeals affirmed, on grounds urged by First Union in both the District Court and the Court of Appeals, finding that because the determination of insolvency is an act committed to the discretion of the federal regulators, the trustee could not show causation for the alleged damage, and further, that because the regulators had an absolute right to the information purportedly disclosed by First Union, the trustee could not state a claim. As a result, the question presented is:

Should this Court exercise its discretionary review powers to review a decision of the Eleventh Circuit Court of Appeals affirming the dismissal of state-law based claims on causation grounds, which decision was also supported on alternative grounds as articulated by the Court of Appeals and the District Court?

LIST PURSUANT TO RULE 29.6

Respondent First Union National Bank of Florida is a wholly owned subsidiary of First Union Corporation. A list of the direct and indirect nonwholly owned subsidiaries of First Union Corporation and First Union National Bank of Florida is set forth in the Appendix (App., *infra*, pp.B1-B6).

TABLE OF CONTENTS

QUESTION PRESENTED i
LIST PURSUANT TO RULE 29.6 ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTION 1
STATEMENT OF PROCEEDINGS BELOW 1
REASONS FOR DENYING THE PETITION 4

A. The Eleventh Circuit Correctly Held that Under Applicable Law, the Petitioner Could Not State a Cause of Action Against First Union. 5

B. The Eleventh Circuit's Decision Creates No New Federal Common Law. 8

C. Brandt's Petition Fails to Acknowledge or Address the Alternative Basis for the Eleventh Circuit's Judgment and, as a Result, Discretionary Review is Inappropriate. 11

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Adams v. Board of Governors of the Fed. Reserve Bd., 855 F.2d 1336 (8th Cir. 1988) . 13

Alario v. Miller, 354 So. 2d 925 (Fla. Dist. Ct. App. 1978) 8

Atherton v. FDIC, 117 S. Ct. 666 (1997) . . . 9, 11

Barr v. Matteo, 355 U.S. 171 (1957) 13

Biscayne Fed. Sav. & Loan Ass'n v. Federal Home Loan Bank Bd., 720 F.2d 1499 (11th Cir. 1983) 6, 7

Brandt v. Bassett (In re Southeast Banking Corp.), 855 F. Supp. 353 (S.D. Fla. 1994), *aff'd in part and rev'd in part on other grounds*, 69 F.3d. 1539 (11th Cir. 1995) 8

Brandt v. Bassett (In re Southeast Banking Corp.), 827 F. Supp. 742 (S.D. Fla. 1993), *aff'd in part and rev'd in part on other grounds*, 69 F.3d 1539 (11th Cir. 1995) 8

Brandt v. FDIC, 65 U.S.L.W. 3444 (U.S. March 17, 1997) (No. 96-939) 11

Brandt v. First Union Corp. (In re Southeast Banking Corp.), 93 F.3d 750 (11th Cir. 1996) 1, 3, 4, 7, 10, 12

Briggs v. Spaulding, 141 U.S. 132 (1891) . 11

City of Milwaukee v. Illinois, 451 U.S. 304 (1981) 11

CASES

D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942) 11

Dubbin v. Touche Ross & Co., 324 So. 2d 128 (Fla. Dist. Ct. App. 1975) 8

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) 11

FDIC v. Irwin, 916 F.2d 1051 (5th Cir. 1990) 6, 7

Fleming v. Lind-Waldock & Co., 922 F.2d 20 (1st Cir. 1990) 6

Fried v. Easton, 293 So. 2d 87 (Fla. Dist. Ct. App. 1974) 8

Golden Pac. Bancorp v. Clarke, 837 F.2d 509 (D.C. Cir. 1988) 6

Hess v. FDIC, 117 S. Ct. 760 (1997) 11

Interstate Sec. Corp. v. Hayes Corp., 920 F.2d 769 (11th Cir. 1991) 8

Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27 (1993) . . 12

McAllister v. United States, 348 U.S. 19 (1954) 5

Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A., 83 F.3d 1317 (11th Cir. 1996) (en banc) 11

O'Melveny & Myers v. FDIC, 114 S. Ct. 2048 (1994) 9, 11

Papasan v. Allain, 478 U.S. 265 (1986) . . . 5

Rice v. Sioux City Mem'l Park Cemetery, Inc., 349 U.S. 70 (1955) 5

Snowden v. Hughes, 321 U.S. 1 (1944) . . . 5

CASES

Texas v. Mead, 465 U.S. 1041 (1984) 5

The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959) 5

United States v. Chuang, 897 F.2d 646 (2d Cir. 1990) 13

Vacuum Indus. Pollution, Inc. v. Union Oil Co., 764 F. Supp. 507 (N.D. Ill. 1991), *aff'd*, 958 F.2d 375 (7th Cir. 1992) 6

RULES AND REGULATIONS

12 C.F.R. § 5.49 (1991) 6

Supreme Ct. R. 10(a) 4

STATUTES

12 U.S.C. § 191 6

12 U.S.C. § 248(a)(1) 13

12. U.S.C. § 1819 2

12 U.S.C. § 1821(c)(5) 6

12 U.S.C. § 1821(d)(2)(A)(i) 8

12 U.S.C. § 1844 13

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1334(b) 2

28 U.S.C. § 1452(a) 2

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App., pp.1a-5a) is reported at 93 F.3d 750. The order of the District Court (Pet. App., pp.6a-13a) is unreported.

JURISDICTION

The judgment of the Court of Appeals (Pet. App., pp.14a-15a) was entered on September 3, 1996. A petition for rehearing was denied on November 8, 1996. (Pet. App., pp.16a-17a). The Petition for a Writ of Certiorari was filed on February 7, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF PROCEEDINGS BELOW

The Petitioner is William A. Brandt, Jr. ("Brandt"), as Trustee of the Chapter 7 bankruptcy estate of Southeast Banking Corporation ("Southeast"). The Respondents are First Union Corporation, its wholly owned subsidiary, First Union National Bank of Florida (collectively "First Union"), and the Federal Deposit Insurance Corporation ("FDIC"), which intervened as a party defendant in the Bankruptcy Court.

Brandt commenced the civil action that is the subject of this Petition in 1994 by the filing of the complaint (Pet. App., pp.18a-51a) in the Circuit Court of the Eleventh Judicial District in and for Dade County, Florida. Brandt alleges that First Union and Southeast entered into a written agreement relating to a potential business combination or other transactions which required that First Union maintain the information disclosed to First Union by Southeast in confidence. Brandt further alleges that Southeast provided confidential information to First Union in connection with First Union's due diligence relative to a potential transaction. The essence of Brandt's complaint is the claim that First Union improperly provided information to the federal bank regulatory authorities prompting them to close the insolvent bank subsidiaries of Southeast. *Brandt v. First Union Corp. (In re Southeast Banking Corp.)*, 93 F.3d 750, 751 (11th Cir. 1996); (Pet. App., pp. 23a-31a; ¶¶15-35). Brandt alleges

that such action by First Union violated the written agreement between Southeast and First Union and gave rise to other state law claims against First Union. (*Id.*)

First Union removed the action to the United States Bankruptcy Court for the Southern District of Florida where the Chapter 7 case of Southeast was pending. *See* 28 U.S.C. § 1452(a). The reference of the matter was subsequently withdrawn by the District Court. (Pet. App., p.6a). Jurisdiction of the District Court was based upon "related to" jurisdiction under 28 U.S.C. § 1334(b) and based upon the FDIC's presence as a party in the action under 12 U.S.C. § 1819. First Union asserted a third-party complaint against the FDIC in its corporate capacity based upon the indemnification provisions in the agreement whereby the FDIC sold to First Union the assets of the failed banks. (App, *infra*, p.A3). The FDIC also intervened in the action and on January 25, 1995, the District Court issued an Omnibus Order striking First Union's third-party complaint against the FDIC pursuant to Rule 14(a) of the Federal Rules of Civil Procedure (the "Rules"), but permitting the FDIC's intervention as a party defendant. (App., *infra*, p.A2). Both First Union and the FDIC moved to dismiss Brandt's complaint pursuant to Rule 12(b)(6).

By Order dated April 24, 1995, the District Court dismissed Brandt's complaint in its entirety and directed the case to be closed for administrative purposes. (Pet. App., pp.12a-13a). The District Court found that Brandt had alleged claims that were entirely derivative of any harm to the subsidiary banks and that Brandt did not allege any injury to Southeast, the holding company, independent of the subsidiary banks. (Pet. App., pp.11a-12a). As a result, Brandt did not have standing to assert the claims in his complaint. Although not mentioned by Brandt in his Petition, the District Court also addressed the merits of one count of the complaint. As to the breach of the so-called "standstill" provision contained in the written agreement between First Union and Southeast, even assuming standing, the District Court found that the agreement provided an

exclusion for "federally assisted regulatory transactions" which was completely applicable to the circumstances of the case and, as a result, barred any recovery by Brandt. (Pet. App., p.12a). Brandt appealed the dismissal of the Complaint to the Eleventh Circuit Court of Appeals and First Union cross-appealed the order striking the third-party complaint against the FDIC. (Pet. App., p.3a).[1]

The Eleventh Circuit affirmed the judgment of the District Court on a separate ground — that Brandt did not and could not establish causation for any damages allegedly resulting from First Union's alleged pre-seizure conduct. This alternative ground for dismissal of Brandt's complaint was raised by First Union and the FDIC in the District Court and the Eleventh Circuit. Far from extending any immunity under the discretionary function bar of the Federal Tort Claims Act, the Circuit Court held that causation was absent in its holding that: "[n]evertheless, '[o]nly the Comptroller's final decision damaged [the Holding Company,] and no prior act or acts could have so caused the damaged [alleged to have occurred by First Union] without the ultimate declaration of insolvency.' " *Brandt v. First Union Corp. (In re Southeast Banking Corp.)*, 93 F.3d 750, 751 (11th Cir. 1996); (Pet. App., p. 4a).

---

[1] First Union timely appealed the order of the District Court striking its third-party complaint against the FDIC. Thus, Brandt's statement in his Petition (Petition, p.21, n.10), to the effect that the FDIC had no indemnity obligation to First Union that relates to Southeast's claims against First Union is incorrect. The Eleventh Circuit determined that the issue was moot and did not reach the propriety of the order striking the third-party complaint. (Pet. App., p.3a).

The Circuit Court also based its decision on an alternative ground — that information allegedly "leaked" to the regulators and First Union's own subjective analysis of that information could not be used to establish a claim as the Court held that: "[n]or can [Brandt] sue First Union for 'precipitating' the government's ultimate action by disclosing information the government was entitled to have." *Id.* at 752; (Pet. App., p.5a).

REASONS FOR DENYING THE PETITION

Brandt fails to meet the requirements for discretionary review in this case. Brandt does not argue or allege that the decision of the Eleventh Circuit Court of Appeals conflicts with a state court of last resort or conflicts with a decision of another Circuit Court of Appeals on the same important matter. *See* Sup. Ct. R. 10(a). Rather, Brandt attempts to create an important federal question where there is none. Brandt stretches and strains the Eleventh Circuit's opinion in this case to conjure up the chimera of federal common law in order to present his Petition. The Eleventh Circuit did not create or extend federal common law to protect First Union. The Court of Appeals determined that under applicable law, Brandt failed to state a claim as Brandt did not, and could not, state causation. The parties did not argue or brief federal common law in the District Court or in the Court of Appeals and the matter was not addressed by the Eleventh Circuit. Finally, Brandt failed to address in his Petition the alternative ground for the judgment of the Circuit Court. This alternative ground, that First Union could not be sued for precipitating the government's ultimate action by disclosing to the banking regulators information those regulators were entitled to have, does not raise, even under Brandt's strained analysis, any issue of federal common law or any issue requiring discretionary review by this Court. Accordingly, this Court should deny Brandt's Petition.

A. The Eleventh Circuit Correctly Held that Under Applicable Law, the Petitioner Could Not State a Cause of Action Against First Union.

It is axiomatic that discretionary review of a decision of a Circuit Court of Appeals by way of certiorari will only be granted in cases involving principles, the settlement of which is of importance to the public, as distinguished from merely those of importance to the parties. *Rice v. Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955); *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959). As a consequence, certiorari is not granted to review evidence or discuss specific facts. *See Texas v. Mead*, 465 U.S. 1041 (1984). *See also McAllister v. United States*, 348 U.S. 19, 23 (1954) (Frankfurter, J., dissenting) (discretionary review should not be applied to cases involving interpretation of facts bearing on the issues of causation or negligence). The proper disposition of the appeal by the Eleventh Circuit in the instant case involved only a matter of interest to the private litigants as the Circuit Court correctly held that under applicable law, Brandt could not state causation for any alleged harm to Southeast. As a result, Brandt's Petition should be denied.

In dismissing Brandt's complaint, both the District Court and the Eleventh Circuit relied solely on the facts alleged in Brandt's complaint.[2] The opinion of the Eleventh Circuit does not purport to announce any broad holding of so-called private immunity for First Union, or indeed for any other party. Brandt's complaint sets forth that Southeast Bank, N.A., the

---

[2] Although for the purposes of a motion to dismiss, the Court of Appeals was to presume that all factual allegations in Brandt's complaint were true, the Court was not bound to accept as true legal conclusions couched as factual allegations. *See Papasan v. Allain*, 478 U.S. 265, 286 (1986). *See also Snowden v. Hughes*, 321 U.S. 1, 10 (1944) (opprobrious epithets and unsupported characterizations add nothing to the plaintiff's complaint). In construing the allegations contained in Brandt's complaint and in affirming the District Court's dismissal, the Court of Appeals properly disregarded Brandt's overheated rhetoric and focused instead on the dispute between the parties.

lead bank subsidiary of Southeast, was a troubled bank with a significant proportion of nonperforming loans, well-publicized losses and nervous depositors. (Pet. App., p.21a, ¶ 8). First Union engaged in discussions with Southeast relating to the possible acquisition of Southeast's subsidiary banks, and performed due diligence on those troubled banks. Due to its problems, Southeast Bank had to borrow more than $500,000,000 from the lender of last resort, the Federal Reserve Bank of Atlanta (the "FRB"), and when the FRB demanded repayment, it was unable to comply. (Pet. App., p.31a, ¶ 34). As a result, Southeast Bank was insolvent as a matter of law and the OCC properly closed it. *See* 12 U.S.C. § 191 and 12 C.F.R. § 5.49 (1991) [subsequently superseded by 12 U.S.C. § 191 and 12 U.S.C. § 1821(c)(5)]. The intervention by the regulators of an admittedly insolvent financial institution cut off any causal connection between any alleged conduct on the part of First Union and any alleged damage to the holding company, Southeast. Once the statutory grounds for the appointment of receiver have been shown, any "judicial inquiry ends." *Biscayne Fed. Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 720 F.2d 1499, 1505 (11th Cir. 1983). *See also FDIC v. Irwin*, 916 F.2d 1051, 1055 (5th Cir. 1990) (focusing on causation and determining that no prior acts could have damaged the plaintiff without the ultimate declaration of insolvency); *Golden Pac. Bancorp v. Clarke*, 837 F.2d 509 (D.C. Cir. 1988).

The Court of Appeals properly considered the issue of proximate cause on the Rule 12(b)(6) motions of First Union and the FDIC. *See, e.g., Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 24 (1st Cir. 1990) (court addressed the proximate cause issue on defendant's motion to dismiss); *Vacuum Indus. Pollution, Inc. v. Union Oil Co.*, 764 F. Supp. 507, 511-12 (N.D. Ill. 1991), *aff'd*, 958 F.2d 375 (7th Cir. 1992) (determining that plaintiff failed to state a cause of action as plaintiff could not allege a causal relationship between the alleged contractual breaches and plaintiff's damages). The Circuit Court correctly held that Brandt's admission of insolvency renders irrelevant

Brandt's allegations concerning First Union's conduct.[3] *See, e.g., Biscayne Fed.*, 720 F.2d at 1503-05 (once the statutory grounds for appointment of a receiver was stipulated to by the parties, the court rejected any claims relating to the "outlandish" or "outrageous" conduct of the regulators prior to the closure of the institution). In addressing this issue, the Eleventh Circuit in this case held that:

> Contending that Southeast Bank was liquid and should not have been closed by regulators, and being unable to sue federal regulators for their discretionary act of closing the bank, the Holding Company instead claims that the closure was precipitated by First Union's disclosures of confidential information to the federal regulators. Nevertheless, "[o]nly the Comptroller's final decision damaged [the Holding Company,] and no prior act or acts could have so caused the damage [alleged to have occurred by First Union] without the ultimate declaration of insolvency." *FDIC v. Irwin*, 916 F.2d 1051, 1055 (5th Cir. 1990). The Comptroller's decision is not an act for which First Union can be held liable. *See Id.*, at 1053-56.

Southeast Bank, 93 F.3d at 751; (Pet. App., p.4a).

The Eleventh Circuit conducted a thorough and searching inquiry of Brandt's complaint and determined that Brandt did not, and could not, state a causal connection between the

---

[3] Brandt's inability to state a cause of action absent the regulatory intervention of the subsidiary banks is illustrated at p.3 of his Petition where he states that "[a]s a result of First Union's persistent and persuasive efforts, the regulators . . . finally closed the banks in September of 1991." (Petition at p.3). At p.22 of Brandt's Petition, he contends that a claim against First Union "might include evidence of the banks' actual solvency at the time of the closure . . . " (Petition at p.22). Given the admission that in fact the subsidiary banks were insolvent, Brandt's argument that his complaint is based upon something other than the regulatory closure of the banks and the sale of the assets to First Union was rightly rejected by the Eleventh Circuit.

alleged conduct of First Union and its alleged damage.[4] Brandt has made no allegation or argument that the Eleventh Circuit misread his complaint. The judgment of the Eleventh Circuit, in affirming the dismissal of Brandt's complaint, settled a dispute arising between two private litigants in accordance with well-settled principles of law. As a result, no grounds exist for discretionary review of the opinion by this Court.

B. The Eleventh Circuit's Decision Creates No New Federal Common Law.

The focus of Brandt's argument is on the unsupportable proposition that the Eleventh Circuit's opinion below creates a

---

[4] Moreover, the District Court's dismissal of Brandt's complaint may be affirmed on a number of other grounds. As noted in the District Court's Order, the claims and causes of action asserted by Brandt in the complaint are owned exclusively by the FDIC as receiver and may not be asserted by Brandt. *See* 12 U.S.C. § 1821(d)(2)(A)(i); *Brandt v. Bassett (In re Southeast Banking Corp.)*, 827 F. Supp. 742 (S.D. Fla. 1993), *aff'd in part and rev'd in part on other grounds*, 69 F.3d 1539 (11th Cir. 1995); *Brandt v. Bassett (In re Southeast Banking Corp.)*, 855 F. Supp. 353 (S.D. Fla. 1994), *aff'd in part and rev'd in part on other grounds*, 69 F.3d. 1539 (11th Cir. 1995); *Fried v. Easton*, 293 So. 2d 87 (Fla. Dist. Ct. App. 1974); *Alario v. Miller*, 354 So. 2d 925, 926 (Fla. Dist. Ct. App. 1978). *See also Dubbin v. Touche Ross & Co.*, 324 So. 2d 128, 129 (Fla. Dist. Ct. App. 1975) (alleged third-party beneficiary's contract with defendant failed to state cause of action where damage, if any, was to the corporation). Further, as the District Court properly held, the written agreement between First Union and Southeast explicitly authorized the conduct of First Union alleged in the complaint. The tort-based claims asserted by Brandt also fail under the Florida economic loss rule. *See Interstate Sec. Corp. v. Hayes Corp.*, 920 F.2d 769, 774 (11th Cir. 1991). Finally, Brandt's intimation that his claims could well have been asserted by Southeast against First Union had there been no intervention and sale of the banks' assets (Petition, p.10, n. 3, and p.22) was expressly considered and rejected by the Court of Appeals. (Pet. App., p.4a). In his complaint, Brandt has only alleged that First Union "asserted influence", made public statements which made it "more difficult" for the banks to surmount their economic problems and that ultimately First Union's "wish was granted" when the FDIC sought bids for a federally-assisted sale of the assets of the subsidiary banks. (Pet. App., pp.24a, 27a, 28a-30a, ¶¶ 17, 24, 27 and 32).

federal common law rule to grant "immunity" to a private party. Brandt engages in an impressive, but irrelevant, analysis of the recent authority relating to the creation of federal common law to bolster his position; however, Brandt simply misses the import and the effect of the ruling of the Circuit Court in this regard: the Circuit Court's decision had nothing to do with federal common law.

Brandt relies heavily on the recently-decided case of *Atherton v. FDIC*, 117 S. Ct. 666 (1997), for the proposition that this Court has "reaffirmed and revitalized" the precept that only in a few and restricted instances may federal courts create a federal common law rule of decision and thereby displace state law. (Petition at p. 7). Brandt's reliance on *Atherton* and its predecessor, *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048 (1994), is unavailing. In both *O'Melveny* and *Atherton*, the FDIC sought the imposition of a federal common law rule applicable to situations in which the FDIC, as receiver for a failed financial institution, was asserting claims against former officers and directors of the failed institution or against its professionals, such as the institution's counsel. In both situations, the FDIC actively argued for the imposition of a federal common law rule of decision governing actions against the failed financial institution's officers and directors and/or its counsel.

In stark contrast, the parties below did not argue for a "federal common law" immunity for First Union. Instead, the issue was framed in terms of the inability of Brandt to state a claim because he had failed to plead proximate cause and that an intervening act, namely the admittedly proper regulatory closures of the insolvent banks, cut off any causal connection between the alleged conduct of First Union and the alleged damage (the loss and the value of the stock of the subsidiary banks). The opinion of the Eleventh Circuit does not address federal common law, nor undertake to analyze the issue of federal common law under *O'Melveny* or its antecedents. Instead, and quite naturally, the Eleventh Circuit focused on the

allegations in Brandt's complaint and whether First Union could be held liable where the sole cause of the alleged damage was not linked to any conduct on the part of First Union. The Eleventh Circuit held that it could not for two reasons. First, the damage, if any, was caused by the admittedly proper regulatory closure of the banks. Second, the basis of First Union's alleged liability — its disclosure of information about the financial condition of Southeast's insolvent banks — was information "the government was entitled to have." *Southeast Bank*, 93 F.3d at 752; (Pet. App., p.5a). The District Court had, of course, found that First Union could not be liable to Brandt for two independent reasons. First, the Court held that Brandt did not have standing to bring the derivative claims of the shareholder of the banks. (Pet. App., pp.9a-12a). Brandt, in his capacity as trustee for the holding company, brought the action on behalf of that holding company, and not the subsidiary banks, and the District Court found that as to the alleged harm, only the FDIC has standing. Second, the District Court determined that the written agreement between the parties authorized First Union's alleged conduct and barred any recovery by Brandt. (Pet. App., p.12a).

The Circuit Court's opinion does not address federal common law and does not implicate this Court's decisions in

O'Melveny and *Atherton*.[5] In his Petition, Brandt has stretched and strained the Circuit Court's opinion in a vain attempt to articulate an important federal question that should be reviewed and considered by this Court. The Eleventh Circuit's narrow, fact-specific decision simply did not create any federal common law or any general rule of decision applicable beyond the four corners of Brandt's complaint. Brandt's speculation

---

[5] At footnote 9 of his Petition, Brandt suggests that this Court has vacated and remanded "another recent Eleventh Circuit common law making decision for reconsideration in light of *Atherton*." However, the decision of the Eleventh Circuit in *Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A.*, 83 F.3d 1317 (11th Cir. 1996) (en banc), *vacated and remanded sub nom. Hess v. FDIC*, 117 S. Ct. 760 (1997), addressed an entirely different question: whether the common-law doctrine of *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) (decided some 14 years after *Erie, infra*) survived as a valid federal common law rule in the aftermath of Congress' enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"). *See, e.g., City of Milwaukee v. Illinois*, 451 U.S. 304, 316-19 (1981) (analyzing whether federal statutory law governs a question previously the subject of federal common law). The issue in *O'Melveny* was whether or not the Court would create a new federal rule of decision for imputation of knowledge where the FDIC was asserting a claim as receiver for a failed financial institution. In *Atherton*, the question was slightly different: whether the federal common law standard for directors and officers of a federally-chartered bank announced in *Briggs v. Spaulding*, 141 U.S. 132 (1891), survived this Court's holding in *Erie Railroad. Co. v. Tompkins*, 304 U.S. 64 (1938). In *Atherton*, the Court concluded that the federal common law standards enunciated in *Briggs* did not survive *Erie* and that there was no need for the creation of federal common law with respect to the standard of care for officers and directors of federally-chartered banks. *Atherton*, 117 S.Ct. at 674. Each of these three cases raise questions different from the question presented by Brandt's Petition here. Thus, Brandt's citation to the *Motorcity* case mischaracterizes its holding and its relevance to the instant case. Moreover, on March 17, 1997, this Court granted Brandt's petition for a writ of certiorari in an unrelated action against the FDIC. *Brandt v. FDIC*, 65 U.S.L.W. 3444 (U.S. Mar. 17, 1997) (No. 96-939). That case also addressed whether the so-called *D'Oench* doctrine survived the enactment of FIRREA. The Court's disposition of Brandt's petition for a writ of certiorari in that matter has no relevance to the instant Petition.

and surmise to the effect that would-be predators will decimate the banking industry are unsupported by any fact in the record and any legal authority whatsoever. The so-called "blunt tool created by the Eleventh Circuit" apparently has not[6] and will not cut any "swath across the judicial landscape." (Petition, p.25). Brandt has simply failed to articulate for this Court any basis for discretionary review of the Eleventh Circuit's judgment, which was proper on the facts alleged in Brandt's complaint and the law applicable to the dispute.

C. Brandt's Petition Fails to Acknowledge or Address the Alternative Basis for the Eleventh Circuit's Judgment and, as a Result, Discretionary Review is Inappropriate.

Finally, Brandt entirely neglects the alternative basis for the affirmance of the District Court's dismissal of the case. At the end of its opinion, the Eleventh Circuit indicates that a cause of action could not be brought against First Union for "precipitating" the government's ultimate action by disclosing information that the government was entitled to have. *Southeast Bank*, 93 F.3d at 752. (Pet. App., p.5a). Brandt's federal common law argument does not address this alternative ground for the decision of the Eleventh Circuit and, for this separate reason, this Court should deny Brandt's Petition. Even if the Court were to grant Brandt's Petition and determine that the Circuit Court somehow improperly created federal common law, the Eleventh Circuit articulated independent grounds for the affirmance of the dismissal of Brandt's claims. Accordingly, addressing Brandt's defective Petition would be a meaningless act. *See, e.g., Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips*

---

[6] Indeed, if Brandt's claims relative to this fundamental shift in federal-state power were correct, one would expect that the decision below would have been discussed, or even mentioned, by the courts in the intervening seven months since the entry of the Circuit Court's judgment on September 3, 1996. In fact, not one published decision has been rendered which discusses, or even mentions, the decision below.

Corp., 510 U.S. 27, 32-34 (1993) (dismissing the writ of certiorari as improvidently granted where it appeared that the petitioner failed to preserve the issue of its intervention in the case before the Circuit Court of Appeals); *Barr v. Matteo*, 355 U.S. 171, 172-73 (1957) (recognizing that the Court's duty is to confine itself to the proper exercise of its jurisdiction and that an advisory opinion should not be issued).

As a matter of law, the OCC and the Federal Reserve are accorded broad supervisory authority to examine the accounts, books and affairs of national banks (which would include First Union). *See* 12 U.S.C. § 248(a)(1) and 12 U.S.C. §1844. *See also Adams v. Board of Governors of the Fed. Reserve Bd.*, 855 F.2d 1336 (8th Cir. 1988) (Federal Reserve Board had power to review and examine specific customer account information without compliance with notice and procedural requirements of the Right to Financial Privacy Act); *United States v. Chuang*, 897 F.2d 646 (2d Cir. 1990) (bank CEO had no legitimate expectation of privacy related to bank documents in question as they were subject to periodic examination by the OCC, which has a statutory duty to examine the affairs of every national bank). The federal regulators had access to all of the information allegedly given to those regulators by First Union. Both the FDIC and First Union argued in the District Court and in the Circuit Court that no breach of the alleged duty of confidentiality could have occurred as the government was fully entitled to the allegedly confidential information. Further, both the FDIC and First Union argued that under Florida contract law, the agreement between First Union and Southeast could not be construed to prohibit First Union from disclosing information to the regulators. On this alternative ground, the Eleventh Circuit properly held that no cause of action would lie. Beyond doubt, there is no issue of federal common law in this context. Brandt's failure to address and preserve this issue precludes discretionary review of the Eleventh Circuit's judgment through certiorari.

CONCLUSION

For all of these reasons, this Court should deny the Petition for a Writ of Certiorari requested by William A. Brandt, Jr., as Trustee for the Chapter 7 Estate of Southeast Banking Corporation.

Ben F. Johnson, III
Counsel of Record
Dennis J. Connolly
Alston & Bird
1201 West Peachtree
Street, N.E.
Atlanta, Georgia 30309-3424
Telephone: (404) 881-7000

Eugene E. Stearns
Mark P. Dikeman
Stearns Weaver
Miller Weissler
Alhadeff & Sitterson
Suite 2300 Museum Tower
150 West Flagler Street
Miami, Florida 33130
Telephone: (305) 789-3200

Counsel for Respondents
FIRST UNION CORPORATION
and FIRST UNION NATIONAL
BANK OF FLORIDA

April 9, 1997

APPENDICES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 94-1803-CIV-HURLEY

WILLIAM A. BRANDT, JR.,)
Plaintiff,)
v.)
FIRST UNION CORP. et al.,)
Defendants.)

OMNIBUS ORDER

These matters come before the court upon the following motions:

1) Federal Deposit Insurance Corporation's motion to intervene as a party defendant, and for extension of time to file Rule 24(c) pleading;

2) Plaintiff's motion to strike third-party complaint;

3) Federal Deposit Insurance Corporation's motion to strike third-party complaint; and

4) Plaintiff's motion for abstention and/or to remand.

Upon consideration of these motions, all memoranda filed in response thereto, and relevant portions of the record, the court concludes the following.

I. FDIC'S MOTION TO INTERVENE

The Federal Deposit Insurance Corporation ("FDIC") seeks to intervene pursuant to Rule 24(a) and/or 24(b) of the Federal Rules of Civil Procedure. FDIC cites a number of bases upon which it should be allowed to intervene,[1] the most persuasive of which is that plaintiff and defendant have placed at issue in this case the terms and conditions under which FDIC may

[1] As is discussed below, one of the bases asserted to support intervention is made moot by this order.

pursue a potential acquisition/failure transaction with an interested party. Given that fact, it is clear that FDIC has an interest in questions of both law and fact raised in the main action.[2] Furthermore, there can be little doubt that FDIC is better suited to identify any government policies implicated by this action, and defend the government's interest in advancing those policies, than is defendant. Finally, there is no indication that allowing FDIC to intervene will unduly delay or prejudice the adjudication of the rights of the original parties. Accordingly, intervention under Rule 24(b)(2) is proper.

II. MOTION TO STRIKE THIRD-PARTY COMPLAINT

Both plaintiff and FDIC move to strike the third-party complaint,[3] arguing that is it wholly meritless. The court begins by noting that motions to strike are disfavored under the Federal Rules. They are only to be granted where the matters sought to be omitted have no possible relationship to the controversy, may confuse the issues or otherwise prejudice a party.[4] However, where these conditions are satisfied, motions to strike a useful means of narrowing the issues in an action, saving time

---

[2] Rule 24(b)(2) permits intervention "when an applicant's claim or defense [as set forth in a pleading filed in conformance with Rule 24(c)] and the main action have questions of law or fact in common." FDIC has not yet filed a Rule 24(c) pleading. However, it cites a number of potential defenses in its memorandum in support of its motion to intervene, and seeks an extension of time to file the Rule 24(c) pleading. The extension was apparently made necessary by the peculiar posture of this action. However, this order should eliminate any ambiguities regarding the interests of the respective parties, thereby clearing away any obstacles to the prompt filing of FDIC's claim or defense pleading in conformance with Rule 24(c).

[3] Under Rule 14(a) of the Federal Rules of Civil Procedure, "[a]ny party may move to strike the third-party claim."

[4] See, Augustus v. Board of Public Instruction of Escambia County, 306 F.2d 862, 868 (5th Cir. 1962); R.T.C. v. Youngblood, 807 F. Supp. 765 (N.D. Ga. 1992); R.T.C. v. Holland & Knight, 832 F.Supp. 1532, 1533 (S.D. Fla. 1993).

and expense, and avoiding confusion.[5] In this case, the indemnity claim set forth in the third-party complaint is wholly meritless. Consequently, granting the motion is completely appropriate, as striking the third party complaint will eliminate any litigation on the issue of indemnity, saving time and expense, avoiding confusion.[6] In the third-party claim, First Union relies upon Article XIV of an assistance agreement it entered into with FDIC in September of 1991. The validity and text of that agreement are not disputed. Section 1 of that Article provides as follows:

> 14.1 Indemnification of Indemnitees. From and after the Commencement Date and subject to compliance by the Indemnitees with the provisions of Section 14.2, the Corporation hereby agrees to indemnify and hold harmless against any and all costs, losses, liabilities, expenses (including attorneys' fees incurred prior to the assumption of defense by the Corporation pursuant to clause (4) of Section 14.2), judgements fines and amounts paid in settlement actually and reasonably incurred in connection with claims against any Indemnitee *based on liabilities of the Failed Bank that are not assumed by the Assuming Bank* pursuant to this agreement or subsequent to the execution hereof by the Assuming Bank or any Subsidiary or Affiliate of the Assuming Bank, which unassumed liabilities remain with the Receiver. Such claims for which indemnification is provided hereunder include, without limitation, the following claims set forth in paragraphs (1) through (11), subject to certain exclusions as provided in paragraphs (a) through (i) of this Section 14.1:

(emphasis added.)

The agreement then specifies eleven categories of claims covered by the indemnification clause. Defendant argues that

---

[5] Holland & Knight, 832 F. Supp. at 1533.

[6] Youngblood, 807 F. Supp., at 765.

the claims at issue in this action may fall into at least four of these eleven categories. Reading the language of those four category descriptions in isolation, defendant's argument might be understandable, as those categories provide for coverage of:

> (1) claims based upon the rights of any shareholder or former shareholder as such of (x) the Failed Bank or (y) any Subsidiary or Affiliate of the Failed Bank;...
>
> (5) claims based upon any determination of insolvency and the closing of the Failed Bank by the appropriate regulatory authority;
>
> (6) claims based on the execution and delivery of this Agreement and the consummation of the transactions contemplated thereby;...
>
> (9) claims arising from any action or inaction of any Indemnitee which is taken upon the specific written direction of the Corporation or the Receiver, other than any action or inaction taken in a manner constituting gross negligence or willful misconduct;...

However, these categories cannot be read in isolation. Each must be read in conjunction with the main text of Section 14.1, which limits indemnification to those claims that are *based on liabilities of the Southeast Bank* not otherwise assumed by defendant. It is an elementary tenet of contract law that the subsidiary clauses of the Article must be read to comport with its main text.

Applying this reading of the agreement, it is clear that defendant has no claim for indemnification against FDIC. While plaintiff might not have brought this action were it not for defendant's acquisition of Southeast, the potential liability to which defendant became exposed as a result of its alleged conduct in preparation for acquisition of Southeast was not at any time Southeast's. At all times it has been defendant's alone. Stated another way, plaintiff neither alleges misconduct on the part of, nor claims a right to relief from Southeast. Accordingly,

the third-party complaint is completely groundless, and should be stricken.

III. MOTION FOR ABSTENTION AND/OR REMAND

Defendant acknowledges that the presence of the FDIC in this action provides a basis for federal subject-matter jurisdiction under 12 U.S.C. § 1819 (b) (2) (B). Thus, as FDIC is a party defendant to this action, the action is properly before this court.[7]

In accordance with the foregoing conclusions, it is hereby ORDERED and ADJUDGED as follows:

1) Federal Deposit Insurance Corporation's motion to intervene as a party defendant, and for extension of time to file Rule 24(c) pleading, is GRANTED. FDIC is directed to file a Rule 24(c) pleading within fifteen (15) days of entry of this order.

2) Plaintiff's motion to strike third-party complaint is GRANTED;

3) Federal Deposit Insurance Corporation's motion to strike third-party complaint is DENIED as MOOT; and

---

[7] Lazuka v. FDIC, 931 F.2d 1530, 1535 (11th Cir. 1991).

4) Plaintiff's motion for abstention and/or to remand is DENIED as MOOT.

DONE and SIGNED in Chambers at West Palm Beach, Florida this 25 day of January, 1995.

DANIEL T. K. HURLEY
United States District Judge

Copies furnished to:

EUGENE E. STEARNS, ESQ., 2200 Museum Tower, 150 W. Flagler St., Miami, FL 33130

BEN F. JOHNSON, III, ESQ., One Atlantic Center, 1201 W. Peachtree St., Atlanta, GA 30309-3424

HILLARIE BASS, ESQ., 1221 Brickell Ave., Miami, FL 33131

GREGORY F. TAYLOR, 550 17th St., NW, Room H-5076, Washington, DC 20429

FIRST UNION CORPORATION

LIST OF DIRECT AND INDIRECT NONWHOLLY OWNED SUBSIDIARIES

PURSUANT TO Sup. Ct. R. 29.6

ABCA, Inc.
Melbourne Atlantic Venture Partners

Austin Ventures IV - A.L.P.

Canaan Ventures II

Carousel Capital Partners, L.P.

Center Street Capital Partners, L.P.

Chartwell Capital Investors, L.P.

DeMuth, Folger & Wetherill, L.P.

Education Financing Services, LLC

— Housing Equity Fund of Virginia I, L.P.
— Montgomery Homes L. P. IX
— Parkchester Limited Partnership
— Pendleton Pines Associates, LLC
— Roanoke Community Development Corporation
— Sycamore Row, LLC

— Ashton of Richmond Hill, L.P.
— Athens Rental Housing, L.P.
— NOVA Corporation
— Peppermill Partners, L.P.
— Rome Rental Housing, L.P.
— Sandlewood Terrace of Ludowici L.P.
— Statesboro Rental Housing, L.P.
— Sugar Mill Apartments, L.P.

— First Fidelity Incorporated
— Brynwood Partners, I, L.P.
— Andalusia Senior Housing, L.P.
— Beaumont Avenue Apartments, L.P.

— Chambers Bridge Urban Renewal Housing, L.P.
— Cranford Avenue Apartments, L.P.
— Equitable Realty Associates, L.P.
— Communications Systems Technologies, Inc.
— MaxFlight Technologies, Inc.
— National Resource Directories, Inc.
— Allentown Development Company, Inc.
— NOVA Corporation
— Hamilton Manor Limited Partnership
— Orianna Street Limited Partnership
— St. Joseph's Affordable Housing Limited Partnership
— Northeast Bancorp Inc.
— Radnor Venture Partners, L.P.
— TDH II Limited
— First Union NOVA Holdings of Connecticut, Inc.
— NOVA Corporation
— Arbor Village, L.P.
— Business Development Corporation of South Carolina
— First Union NOVA Holdings of SC, Inc.
— NOVA Corporation
— Atlantic Venture Partners II, L.P.
— Long, Travers & FASC
— Woodlawn Joint Venture
— First Union NOVA Holdings of TN, Inc.
— NOVA Corporation
— Fairbrooke Apartments Limited Partnership
— Fountain Place Associates Limited Partnership
— First Union NOVA Holdings of MD, Inc.
— NOVA Corporation

— 1560 Wilson Boulevard Limited Partnership
— Arbor Glenn L.P.
— Bowler Housing L.P.
— BR Limited Partnership
— Cannon/Heartwood Limited Partnership
— Fairfax County Redevelopment and Housing Authority/HCDC One L.P.
— Fairfax County Redevelopment and Housing Authority/HCDC Two L.P.
— First Union NOVA Holdings of VA, Inc.
  — NOVA Corporation
— First Union Capital Partners, Inc.
  — Arcon HealthCare, Inc.
  — Atlantic Spinners, Inc.
  — Chattem, Inc.
  — Cybergenics Holding, Inc.
  — Electronic Manufacturing Systems, Inc.
  — Envoy Corporation
  — FrontierVision Partners, L.P.
  — FVP GP, L.P.
  — Heartland Port Enterprises, Inc.
  — Meigher Communications, L.P.
  — Renal Disease Management by Physicians, Inc.
  — Right Source, Inc.
— Homes for Fredericksburg Limited Partnership
— Housing Equity Fund of Virginia II, L.P.
— International Progress, Inc.
— Lafayette Family L.P.
— Martin's Landing Limited Partnership
— Martin's Landing II Limited Partnership
— Savings Associations Financial Enterprises, Inc.
— Salem Run Associates, L.P.
— Shenandoah Valley Properties L.P.
  — Craigmont II, L.P.

— Elkmont Partners, L.P.
— Grottoes Partners L.P.
— Willow Lake Partners, L.P.
— Tobacco Row Phase II Associates, L.P.
— WNB Corporation
— William Byrd Hotel Associates, L.P.
— First Union NOVA Holdings of DC, Inc.
— NOVA Corporation
— Savings Associations Financial Enterprises, Inc.
— HONOR Technologies, Inc.
— Virginia Baseball Club, L.P.

The First Service Corporation of South Carolina
— Arrowwood Associates

— Chisholm Partners III, L.P.
— Commonwealth Investors II, L.P.
— High Ridge Capital Partners Limited Partnership
— HRC General Partners Limited Partnership
— Kinder Morgan Energy Partners, L.P.

— Argo Partnership, L.P.
— Farmington, Incorporated
— Ghent-Farmington Associates
— The Fairfax Corporation
— Interchange Partners
— North Ridge, Inc.
— Real Estate Consultants of the South, Inc.

— 100 Block Associates Limited Partnership
— Barrett Place Limited Partnership
— Beechridge Limited Partnership
— CT I Limited Partnership
— First Stratford Partnership
— First Union Rail Corporation
— Ironbrand Capital LLC
— First Wells Fargo Leasing Partnership
— Ironbrand Capital LLC
— Multiplex Leasing Partners

— Besso Holdings Limited

— First Union HKCB Asia, Ltd.

— 100 Block Associates Limited Partnership

— NOVA Corporation

— Flagship Partners, L.P.

— Fox Haven Limited Partnership

— C4 Media Cable South, Limited Partnership

— C4 Media Cable South, Limited Partnership

— Glen Royall Mill Limited Partnership

— Golfview Associates Limited Partnership

— Green Ridge Associates, LLC

— Oak Crest Apartments of Kannapolis, Ltd.

— NNI Bell Street Limited Partnership

— Southwoods Limited Partnership

— Yorktown Arms Development Limited Partnership

Franklin Ventures III, L.P.

HONOR Technologies, Inc.

Kinder Morgan, Inc.

Media/Communications Partners

Morgan Stanley Bridge Fund, LLC

Pacific Venture Group, L.P.

Phillips-Smith Specialty Retail Group III, L.P.

FIRST UNION NATIONAL BANK OF FLORIDA
LIST OF DIRECT AND INDIRECT NONWHOLLY OWNED
SUBSIDIARIES PURSUANT TO Sup. Ct. R. 29.6

— Cantebury of Hilliard, Ltd.
— Creative Choice Homes IX, Ltd.
— Ellenton Housing Associates, Ltd.
— First Union NOVA Holdings of FL, Inc.
  — NOVA Corporation
— Floral Oaks Apartments, Ltd.
— General Homes Corp.
— Greenleaf Village of Groveland, Ltd.
— Indian Run Limited Partnership
— Jacksonville Affordable Housing, Ltd.
— Lantana Associates, Ltd.
— Ravenwood of Kissimmee, Ltd.
— Rosemont Manor Ltd.
— River Reach of Orange County, Ltd.
— Savings Associations Financial
  Enterprises, Inc.
— Spinnaker Reach Apartments of Duval, Ltd.
— Spring Gate Manor Limited
— Steeplechase Apartments, Ltd.
— TWC Eighty-Eight, Ltd.
— TWC Ninety-Six, Ltd.
— VCP-Alderman Park Partners, Ltd.
— Vestcor - WR Associates, Ltd.
— Villa Biscayne of South Dade, Ltd.
— Waterford Manor, L.P.
— West Brickell Apartments, Ltd.
— Westville, Ltd.